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NO. 91-1502

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, et al.,

Appellants,

v.

THE COMMONWEALTH OF MASSACHUSETTS, et al.,

Appellees.

On Appeal From the United States District Court
for the District of Massachusetts

BRIEF OF THE APPELLEES COMMONWEALTH OF MASSACHUSETTS, et al.

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QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that seats in the U.S. House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by [an] actual Enumeration . . . ." Section 2 of the Fourteenth Amendment modified this language by requiring that "Representatives shall be apportioned . . . counting the whole number of persons in each State. . . ." The questions presented by this case are:

1. Whether the Secretary of Commerce's decision to count overseas federal employees as residents of particular states for purposes of congressional apportionment, based on "home of record" data which the Census Bureau had found to be "arbitrary," violated the Administrative Procedure Act.

2. Whether the Secretary of Commerce's decision to apportion overseas employees to particular states in which they did not then reside violated restrictions imposed on apportionment by the Fourteenth Amendment, considered in light of the Amendment's legislative history and contemporaneous interpretation.

3. Whether the remedy ordered by the district court, which does not affect states other than Massachusetts and Washington or the census generally, and requires solely ministerial action by government officials, was appropriate in light of the special circumstances of this case.

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STATEMENT OF THE CASE

This case arises from a 1989 decision by the Secretary of Commerce to reverse the historic practice of federal census authorities and override rules which the Census Bureau itself had adopted for the conduct of the 1990 Census. The Secretary decided to treat federal employees who were living in foreign countries as residents of particular states for purposes of apportioning seats in Congress. The parties have stipulated that this change, which was based on data which the Census Bureau had previously rejected as unreliable, had the effect of depriving Massachusetts of one of its eleven congressional seats and transferring that seat to the state of Washington.

Article I, § 2, cl. 3 of the Constitution, as modified by the Fourteenth Amendment, requires that apportionment decisions be based on an "actual Enumeration" of the "whole number of persons in each state." Pursuant to this mandate, with but a single exception, census authorities have never counted persons living overseas on the census date as residents of particular states. In 1989, the Secretary of Commerce reversed this policy.

In 1990, after the only factual premise for the policy reversal -- that the Department of Defense would conduct an actual enumeration of its overseas employees -- disappeared, the Secretary failed to consider returning to the census' historic practice. Instead, he ordered overseas federal employees to be assigned to states based on administrative file

data that both the Census Bureau and the Department of Defense had publicly and repeatedly criticized as invalid and unreliable. In order to place the Secretary's 1990 decision in context, it is necessary to review the relevant constitutional, statutory and historical framework.

A. Constitutional, Statutory and Historical Background.

The 1787 Constitutional Convention. The fundamental issue confronted by the Framers in 1787 was that of allocating the states' representation in the national legislature. After the Great Compromise, in which the states agreed to apportion seats in the House of Representatives based on population, Wesberry v. Sanders, 376 U.S. 1, 13-14 (1964), the Framers addressed the issue of how congressional representation should be adjusted over time in light of demographic changes. Some delegates argued against "[s]hackling the Legislature too much. We ought to choose wise & good men, and then confide in them." 1 The Records of The Federal Convention of 1787 (Farrand ed. 1911) (hereinafter "Farrand") 578 (quoting Roger Sherman).

Most of the Framers, however, disagreed with the argument that Congress should be given complete discretion to apportion itself.1/ The Convention decided against granting the House

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1/ George Mason commented: "From the nature of man we may be sure, that those who have power in their hand will not give it up while they can retain it...." Id. Edmund Randolph, citing

(footnote continued)

of Representatives full power to decide reapportionment issues. Instead, it mandated that reapportionment be based on an "actual Enumeration," that is, a headcount, of the population. U.S. Const., art. I, § 2, cl. 3 (emphasis added).

The Framers were particularly concerned that the census be conducted on a uniform and nonpolitical basis. During the 1780's, "[t]he Continental Congress had [asked] the states to take censuses for apportionment purposes and had found either that states did not comply or that their methods were not uniform." M. Anderson, The American Census, 10 (1988). The same lack of uniformity had resulted from state-by-state censuses taken during the Revolutionary War. C. Wright and W. Hunt, The History and Growth of the United States Census, 12 (1900). Often, states had either understated their numbers to avoid direct federal taxation, or overstated their populations in order to increase their political power.2/ The Framers

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(footnote continued)

Governeur Morris, noted that because of the problem "of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hand in such a manner that they could not sacrifice their trust to momentary considerations." Id. at 579-80. See also Id. at 586 (Mason and Morris), 583 (Ghorum), 584 (Madison).

2/ The Framers responded to this problem in part by basing both direct taxation and representation on the same apportionment count. The Federalist No. 54. With the abolition of direct federal taxation, however, this constitutional check against political manipulation has disappeared.

therefore mandated that a national census be conducted, so as to create a consistent, apolitical base of data for the periodic reapportionment of Congress. M. Anderson, supra, at 11. See U.S. Department of Commerce v. Montana, No. 91-860, Slip Op. at 23-24 (1992) (hereinafter "Montana") (noting that "to the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served....")

Early Census Practice: The Usual Residence Rule. To carry out this mandate, the First Congress enacted the First Decennial Census Act on March 1, 1790. Appendix to Jurisdictional Statement ("J.S. App.") 59a. 1 Stat. 101. The 1790 Act stated the basic rule of enumeration which has been applied ever since: that "every person" should be counted at his or her "usual place of abode" or at "that place in which he usually resides in the United States." 1 Stat. 101, 103 (emphasis added). J.S. App. 59a.

The First Congress thus implemented the constitutional imperative by creating the concept of "usual residence" to determine where to apportion the American population. Id. Joint Appendix ("Joint App.") 199. This concept, which the Census Bureau has described as the "usual residence rule," has been the "guiding principle" for the conduct of the decennial

census for two hundred years. J.S. App. 59a. Joint App. 173 (Stip. 4). Under the usual residence rule, a person must be counted at the place where he or she is living and sleeping most of the time as of the date the census is taken. J.S. App. 59a. Joint App. 173 (Stip. 5). The only exception is for persons, such as travelers at inns and hotels, who are "occasionally absent" from their homes for a few days or weeks as of the census date. See 1 Stat. 101, 103; Joint App. 174 (Stip. 8).

During the first censuses, federal authorities confronted the issue of how to apply this rule to those Americans who were living outside any state's boundaries on the census date. Significant numbers of American soldiers were stationed at forts and posts in the western territories from the nation's earliest days. J.S. App. 61a. Joint App. 177 (Stip. 16). Beginning with the censuses of 1830 and 1840, federal enumerators addressed the specific question posed in this case, that of where to count troops and other federal employees who were stationed in a foreign country on the census date. Joint App. 177 (Stip. 18).

Census authorities decided to count soldiers and other persons living outside state boundaries (and, in 1830 and 1840, the United States) as part of the overall American population. See Knox v. Lee (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 536 (1871). They were enumerated, however, as residents

of the out-of-state posts where they were living, and were never apportioned back to states where they had lived in the past or might reside in the future. J.S. App. 61a-63a. Joint App. 175 (Stip. 10); 177 (Stip. 18).[3/] During the eighty years between the ratification of the Constitution and the adoption of the Fourteenth Amendment, the federal government never varied in its commitment to the usual residence rule, Joint App. 176 (Stip. 14), nor did it ever include persons living outside any state in apportionment counts. J.S. App. 60a.

The Adoption Of The Fourteenth Amendment And Subsequent Practice. In 1866, following the Civil War, the states again confronted the issue of how to allocate their representation in the House. See Joint App. 235 (Stip. Exh. C: Justice Dept. analysis of legislative history of 14th Amendment); see also J.S. App. 29a, 62a n.25.

The drafters first proposed that seats in the House be allocated according to the number of "legal voters" or "citizens" in each state. Congressmen from the New England states, however, had large numbers of aliens, as well as women and children left behind by western pioneers, in their

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3/ This practice was based on the usual residence rule, not on an absence of data. Because census authorities conducted an oral census, that is, an "actual Enumeration," they could easily have asked troops what state they considered to be their permanent home. Joint App. 174 (Stips. 6, 7). Also, the states of origin of federal soldiers were listed in War Department records of that era. Joint App. 177 (Stip. 17).

populations, and so favored a standard of apportionment based solely on current residence within the borders of a state. The suffrage and citizenship-based proposals were defeated in committee, in favor of an apportionment standard based on residency. See J.S. App. 62a n.25. Joint App. 237. As ratified in 1868, the Fourteenth Amendment read in relevant part as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . .

U.S. Const., amend. XIV, § 2 (emphasis added).

Two years later, in the 1870 census, federal authorities confronted the issue of how to apply the newly-ratified Amendment to apportion federal troops from the North who were occupying the former rebel states. In their first construction of the Amendment, federal census authorities applied the usual residence rule so as to apportion northern troops to the southern states in which they were then posted, rather than to their northern states of origin. See J.S. App. 62a. Joint App. 175 (Stip. 10). They did so despite the fact that the predictable effect of this interpretation was to increase the representation of the former rebel states in Congress throughout the decade of the 1870s. This interpretation was confirmed by formal rules adopted in 1880. J.S. App. 63a.

In 1900 and succeeding censuses, federal authorities repeatedly counted Americans living overseas as part of the

total population of the United States, but again did not apportion them to states. Joint App. 177 (Stip. 18), 179 (Stip. 26). In 1970, for the first time in the nation's history, the Census Bureau did apportion overseas federal employees to particular states. Joint App. 179-80 (Stips. 26, 28). J.S. App. 64a. The decision was based on the fact that large numbers of troops were then serving in Vietnam, and on the expectation that the act would be purely symbolic, in that apportioning overseas troops would not change the representation of any state in Congress. Borough of Bethel Park v. Stans, 449 F.2d 575, 581 (3rd Cir. 1971).[4/]

In 1980, the Census Bureau returned to its historic practice of excluding overseas federal employees from apportionment counts. J.S. App. 65a. The Bureau's reasons included the fact that overseas federal employees were not included in the apportionment counts in any census other than 1970, that the "home of record" data used to assign soldiers to states in 1970 was of unknown reliability, and that the number of overseas employees had dropped from approximately 1.6 million to about 900,000. Joint App. 55. See J.S. App. 64a-65a.

4/ In fact, the apportionment of overseas federal employees to states in 1970 did cause a congressional seat to shift from Connecticut to Oklahoma. Joint App. 179 (Stip. 28). However, the decision was not challenged in the courts.

Conduct of the 1990 Census. Pursuant to statutory obligation, 13 U.S.C. § 141(f)(1), in April 1987 (Administrative Record - "A.R." 213), the Bureau adopted a formal policy paper which defined the rules to be applied in the 1990 enumeration. Joint App. 180 (Stip. 32), 199-228 (policy paper). The Census Director noted in that paper that the usual residence rule "was adopted to comply with constitutional requirements," and reaffirmed the Bureau's intent to adhere to that rule in 1990. Joint App. 205, 208. The Bureau planned to count overseas federal employees as part of the overall American population but not to apportion them to particular states because, the Bureau concluded, it would be "arbitrary" to do so. Joint App. 200, 212 (emphasis added).[5/]

During the late 1980s, the Department of Commerce and the Census Bureau repeatedly opposed several legislative proposals to apportion overseas employees to states on the grounds, among others, that to do so would be inconsistent with the usual residence rule. Joint App. 180-181 (Stips. 33, 34, 36, 37); 110, 112, 118. The Departments of Commerce and Justice also expressed "serious doubt as to the constitutionality" of the

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5/ The Bureau's 1987 rules stated that in 1990 (as in every prior census since 1790) all federal civilian and military employees who were stationed at domestic posts should be apportioned to the place where they were usually living and sleeping as of the census date, rather than to their states of origin. Joint App. 201, 222.

proposals under the Fourteenth Amendment. Joint App. 241 (Stip. Exh. C); Joint App. 111, 113, 119. J.S. App. 65a. None of the proposals was enacted into law. Id.[6/]

The Census Bureau proceeded to apply its rules to domestic military and civilian federal employees in 1990, as to other Americans, and apportioned them to the states where they were living on the census date. Joint App. 174-5 (Stips. 9, 10). But on July 31, 1989, then-Secretary of Commerce Robert Mosbacher decided to reverse the Census Bureau's prior policy and disregard the usual residence rule as to overseas employees alone. He instructed the Bureau to apportion federal employees living overseas to various states which were not their usual residences. Id. (Stips. 8, 9, 10).

The Secretary adopted a two-page "decision memorandum" listing three basic factors for the policy reversal. Joint App. 120. It was summarized by the district court as follows:

> "First, from a political perspective, the memorandum proposed '[t]o satisfy what appears to be a growing bipartisan concern of the Congress and to avoid unnecessary debate.'
>
> Second, from a factual perspective, the memorandum reported that the Department of Defense would be conducting a census of its military and civilian employees and consequently 'it is now feasible to provide the necessary counts of usual residents' in a timely manner.
>
> Third, from a legal perspective, the memorandum referred to the 1969 opinion letter of the Assistant Attorney General rendered in connection with the 1970 census, concluding that such a policy decision was "in the discretion of the Director of the Census."

J.S. App. at 66a.

The factual basis for the Secretary's decision, the promised Department of Defense survey, was especially important because the Constitution requires that the census be based on an "actual Enumeration," i.e., a headcount, of the population. U.S. Const. art. I., § 2, cl. 3. The Defense Department's agreement to actually enumerate its employees was crucial because DOD personnel and their dependents made up nearly 98 percent (901,880 of 922,819) of the federal employees who were apportioned to states in 1990. Joint App. 185 (Stip. 53). The factual basis for the Secretary's decision was abruptly invalidated, however, in December of 1989, when the DOD cancelled its promised enumeration. J.S. App. 67a, 75a-76a. Joint App. 184 (Stip. 46).

At this point the Census Bureau, "responding to what appear to have been inertial forces which did not permit even thinking about turning back once the policy reversal had been announced," continued to execute the Secretary's commitment to

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6/ Only a single bill that would have required the apportionment of overseas federal employees, H.R. 4903, was passed by one House of Congress. This occurred in 1990, almost a year after the Secretary's 1989 decision to include overseas employees in the apportionment counts. Joint App. 184 (Stip. 49). Congress has never enacted a statute calling for apportionment of overseas federal employees, nor have the defendants ever promulgated any regulation on the subject. Joint App. 178 (Stip. 20).

apportion overseas federal employees to states. J.S. App. 76a. The Administrative Record shows no evidence that the Secretary reconsidered his decision in light of changed circumstances. Id. At oral argument, the district court attempted to elict some rationale for the Secretary's failure to reconsider. The colloquy was as follows:7/

> Justice Dept.: . . . At that point, July 31st 1989, Secretary Mosbacher made an announcement. He made a commitment to Congress that we're going forward with it, we're going to include the overseas federal employees . . .
>
> Judge Woodlock: All of that -- so, what it is, is a kind of Brer Rabbit and the tar baby. I mean, he hit it already and so he couldn't let go. And, so, he wanted to continue with it. Is that it?
>
> Justice Dept.: Well, he made a commitment to Congress. Congress has relied on that decision and an issue --
>
> Judge Woodlock: Congress made a commitment--
>
> Judge Bownes: He made a commitment to certain people.
>
> Judge Woodlock: And Congress made a commitment to the Department of Defense to provide them with a budget.
>
> Justice Dept.: I'm not aware of that. But he made a commitment to Congress.
>
> Judge Woodlock: And, so, the justification for it was DOD told them they could do it, they would do a head count and it was too late in December of '89 to change it?

7/ The transcript of the hearing below has been lodged with the Clerk of this Court.

> Justice Dept.: That's correct, Your honor.
>
> Judge Woodlock: That's the justification that makes it not arbitrary and capricious?
>
> Justice Dept.: That's correct. . . .

Tr. 90-92. See also Tr. 101-102.8/

These factual representations, taken with the absence of any evidence of reconsideration in the Administrative Record, led the three-judge court to conclude that the Secretary had in July 1989 foreclosed reconsideration of his decision to overrule the Census Bureau's historic practice on overseas employees. J.S. App. 78a-79a. The Secretary would not reconsider his decision even in December 1989, when the only factual basis cited for it -- DOD's promise to conduct a true enumeration in order to cure what the Census Bureau had previously called "arbitrary" data -- disappeared.

In the absence of such an enumeration, which has been the basis for the domestic census both historically and in 1990, the Secretary decided to base the apportionment on administrative file data. The Secretary first decided to use personnel data on each employee's "last U.S. address of six months duration." J.S. App. 184a (Stip. 47). See p. 23,

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8/ The Secretary also argued below that it was "too late" even in December 1989 to return to prior policy. The court noted, in response, that it was not until mid-1990 that the Census Bureau even decided what apportionment data to use, and that it was therefore certainly possible to refrain from apportioning at all. Tr. 91-92.

infra. In the summer of 1990, however, months after the April census date, the DOD informed the Census Bureau that it could not provide the necessary data to apportion its employees based on "last six months U.S. address" either. Joint App. 184 (Stip. 48).

The Census Bureau ultimately decided to use DOD file data on overseas employees' "homes of record." This was the same data that the Bureau had repeatedly declared to be too unreliable to use for apportionment in 1990, J.S. App. 76a; which it had opposed using as the basis for apportionment for twenty years, see Joint App. 55, 61, 79, 136; A.R. 37, 41, 43, 83, 224, 832, 857; and which the Bureau had formally concluded in 1987 "would be arbitrary" to use. J.S. App. 88a (emphasis in original). The Bureau had opposed the use of home of record data, among other reasons, because it was rife with errors, and was inconsistent with the usual residence rule. See infra at 24-26. Nevertheless, the Secretary failed to consider an obvious alternative, and home of record data was ultimately used. J.S. App. 76a.

The results from the 1990 census of overseas federal employees were uneven at best. These results are described in detail at pp. 27-28, infra. The distribution of DOD's home-of-record file data among the states was significantly different from the distribution of the domestic American population. J.S. App. 89a-90a. The parties have stipulated

that as the direct result of the apportionment of overseas federal employees, Massachusetts lost one of its existing eleven seats in Congress. Joint App. 183 (Stip. 42).

B. Proceedings Below.

After investigation confirmed that the loss of its congressional seat was caused by the Secretary's decision to include overseas federal employees in state apportionment counts, on May 1, 1991, the Commonwealth and two registered voters filed suit in federal district court, claiming, inter alia, that the Secretary's decision violated the restrictive language of the Fourteenth Amendment and was arbitrary, capricious and an abuse of discretion, in violation of the Administrative Procedure Act. Joint App. 20-35.[9/]

The parties agreed to submit the case for decision on a Joint Stipulation together with the Administrative Record. The Chief Justice of the First Circuit assembled a three-judge panel to hear the case pursuant to 28 U.S.C. § 2284.[10/] Cross-dispositive motions were filed on November 5, 1991.

9/ Massachusetts also argued that the formula used to allocate seats in Congress among the states violates the Constitution. That claim was denied by the district court and is foreclosed by this Court's recent decision in Montana. Massachusetts does not press this claim on appeal.

10/ In light of the Secretary's reference to the lower court's "parochial" decision, Application for Stay at 12, the plaintiffs note that the panel that heard this case was made up of judges from three separate states.

Joint App. 10-11.[11/] The court heard oral argument on December 6, 1991, and issued its decision on February 20, 1992. Joint App. 16.

C. The Decision Below.

The district court's narrow ruling rejected the plaintiffs' constitutional claims, but concluded that the Secretary of Commerce had violated the Administrative Procedure Act, 5 U.S.C. § 551 et seq., in the manner by which he decided to include overseas employees in the 1990 apportionment counts. J.S. App. 81a-82a. The district court deferred to the Secretary's power to conduct the decennial census and to Congress' power over reapportionment decisions, and did not limit the future operation of the census or apportionment system in any way, even as to apportioning overseas employees. Id. at 79a.

The court carefully considered whether to remand the case to the Secretary for reconsideration. The three-judge panel decided against a remand for the following reasons. First, "the practical process of reapportionment" required a quick resolution. J.S. App. 82a. Second, counsel had informed the

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11/ Washington state did not intervene as a party but requested to participate as an amicus in the case, as it did in the Montana litigation. Washington filed a brief requesting that the case be dismissed for failure to join an indispensable party. J.S. App. 17a-18a. The district court concluded that the case could proceed despite Washington's refusal to participate as a party. Id. at 18a-20a.

court that the Secretary would not reconsider his choice even in 1989-90 because, as was stressed, the Secretary felt that he had made a "commitment to Congress" in July 1989 which barred him from reconsidering the decision regardless of what facts later came to light. See supra at 12. In these circumstances, the district court concluded that a remand would be a futile and, in light of time constraints, harmful exercise.

The parties had stipulated that if overseas federal employees were not included in apportionment counts, Washington state would lose the additional seat that it had been awarded in the 1990 reapportionment, and Massachusetts would retain its existing eleven congressional seats. Joint App. 183 (Stip. 42). None of the other 48 states would be affected. Id. J.S. App. 83a n.33. Applying this stipulation, the three-judge court ordered the Clerk of the House (who had agreed to be bound by any order that the court might enter, J.S. App. 2a-3a n.1), to issue new certificates to the two states. J.S. App. 83a.

The Secretary moved for reconsideration of the decision, and in that context filed two "Declarations," or affidavits, of officials which attempted to explain how the Secretary had reached his decision. In a per curiam opinion, the court found that these filings violated agreements of counsel and case management understandings reached with the court, as well as constituting "post hoc rationalizations" of the type that this Court has rejected in APA cases. It therefore ordered the

Declarations stricken from the record. J.S. App. 93a. The Secretary did not appeal that order.

SUMMARY OF ARGUMENT

I. The district court concluded that the Secretary of Commerce's decision to apportion overseas federal employees to states where they were not residing, based on data which the Census Bureau had concluded was "arbitrary," violated the Administrative Procedure Act. That ruling was correct.

The Secretary's 1989 decision to reverse Census Bureau policy, based on the Defense Department's promise to conduct an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, may have been sustainable under the APA. But when the DOD abruptly cancelled its census, the Secretary insisted upon apportioning on the basis of "home of record" file data, which both the Census Bureau and the Defense Department had recently condemned as arbitrary and unreliable for apportionment purposes. The use of this data was arbitrary, and violated the APA (pp. 21-28).

Moreover, after the only factual basis for the Secretary's 1989 decision to reverse agency policy -- the DOD's promised enumeration -- disappeared, the Secretary was obligated to consider policy alternatives (such as returning to historic practice) and to give a "reasoned basis" for whatever decision he reached. Instead, because he had made an inflexible

"commitment" to certain members of Congress, the Secretary failed to consider obvious alternatives or provide a viable rationale for his policy. This, too, was arbitrary and capricious (pp. 29-30).

II. The Fourteenth Amendment restricted the language of the original Apportionment Clause, requiring that representation in Congress be based solely on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. The legislative history and contemporaneous interpretations of the Apportionment Clause and the Fourteenth Amendment demonstrate that the drafters' intent was to restrict the basis for apportionment to the current inhabitants of each State. Because the DOD's home of record data did not describe employees' current states of residence, its use for congressional apportionment violated the Fourteenth Amendment (pp. 30-38).

III. Judicial review under the APA of the Secretary's actions with regard to the conduct of the census is not precluded by statute, nor are such actions committed to agency discretion by law. The conduct of the decennial census must be subject to external scrutiny in order to insure a uniform and apolitical base of data for apportionment decisions, as intended by the Framers. A meaningful standard exists for review of census decisions (pp. 40-44). Moreover, Congress has not explicitly precluded APA review of the census, and nothing in the statutory framework implicitly precludes APA scrutiny (pp. 45-51).

IV. The lower court's orders were proper. Although remand is the presumptive remedy for APA violations, a remand is not appropriate where, as here, it would cause serious and irremediable harm. Moreover, a remand would be futile in this case, since it is presently impossible to improve on the data which the Census Bureau itself found to be arbitrary (pp. 51-57).

The lower court's orders are reasonable, in that they affect no states other than Washington and Massachusetts, and have no impact on the census counts generally. Moreover, the court's orders require solely ministerial action by government officials and respect the authority of Congress to reapportion by statute (pp. 57-63).

ARGUMENT

I. THE SECRETARY'S DECISION TO BASE APPORTIONMENT OF OVERSEAS FEDERAL EMPLOYEES ON HOME OF RECORD DATA WAS ARBITRARY AND CAPRICIOUS.

The decisions of federal administrative agencies are subject to judicial review under section 706(2) of the APA. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-14 (1971). Although "the Secretary's decision is entitled to a presumption of regularity, . . . that presumption does not shield his action from a thorough, probing, in-depth review." Id. at 415.

A. The Secretary Acted Arbitrarily by Abandoning an Enumeration in Favor of Home of Record Data.

The Secretary of Commerce decided in 1989 to reverse the historic practice of the decennial census and apportion overseas employees to states. As noted by the lower court, while the Secretary considered three factors in making his decision, one factor -- the Defense Department's promise to conduct an actual enumeration of its overseas employees -- was crucial. J.S. App. 66a.

The DOD's promise was especially significant because the planned enumeration "was expected to generate the kind of reliable information about home states of [overseas] personnel that had not been available for previous census counts." J.S. App. 75a. Joint App. 121. Indeed, a primary reason for the Secretary's decision to return to historic census practice in the 1980 Census was that the home of record data used in 1970 had proven to be unreliable. J.S. App. 64a-65a. Joint App. 55, 61, 180 (Stips. 29-30). A.R. 41. The DOD's promise to enumerate its employees was also important because it meant that the overseas count would use the method of counting -- actual enumeration -- which is specified in the Apportionment Clause and which the decennial census had followed throughout the nation's history.[12/]

12/ Whether pursuant to questions asked by marshalls who personally visited all residences in their districts in order

(footnote continued)

The lower court concluded that if the conditions set forth in his decision memorandum were fulfilled, the Secretary's 1989 decision to apportion overseas employees would not have been arbitrary or capricious. J.S. App. 76a. But one condition was never met: in December 1989, the Department of Defense abruptly cancelled its promise to conduct an actual enumeration of its overseas employees. As the lower court noted, this removed the sole factual basis for the Secretary's decision. Id.

Following the cancellation of the DOD's planned enumeration, Joint App. 184 (Stip. 46), the Secretary could no longer carry out an actual survey of the vast percentage of overseas employees. Instead, in order to apportion at all, the Census Bureau would have to rely on the administrative data in the DOD's personnel files which it had previously been found to

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(footnote continued)

to conduct enumerations in censuses before 1970, or pursuant to questionaires prepared after the mail-out, mail-back procedures were adopted for the 1970 census (see Borough of Bethel Park v. Stans, 319 F. Supp. 971, 975 (W.D.Pa. 1970), aff'd 449 F.2d at 575), the decennial census has since 1790 been conducted by an actual enumeration. Accord Tucker v. United States Department of Commerce, (7th Cir. March 16, 1992) (LEXIS, Genfed library, Courts file) (hereinafter "Tucker"), at Lexis p. 3 ("[t]he decennial census is a headcount rather than an estimation based on sampling"). The single instance in the history of the decennial census where an actual enumeration was not conducted was the count of overseas military personnel in 1970.

be unreliable.[13/]

The Secretary's first alternative was to base apportionment on file data concerning employees' "last six months U.S. address." Joint App. 136, 139, 187 (Stip. 47). A.R. 832. This choice was not entirely unreasoned, because the DOD had stated that it could produce data on last six months U.S. address that would be superior in quality to its home of record data, and because the Census Bureau considered "last six months" data to be more closely analoguous to the usual residence of overseas employees than their homes of record. Joint App. 136. A.R. 832. However, as with the DOD's planned enumeration, the Secretary's decision to apportion based on last six months U.S. address was nullified when the DOD informed the Census Bureau in the summer of 1990 that it could not in fact assemble such data for its overseas employees.

Joint App. 157-58, 184 (Stip. 48).

13/ For the first time in support of her motion for reconsideration below, the Secretary suggested that use of administrative data may even have been preferable to the DOD carrying out its planned enumeration. Her basis for this suggestion is the fact that the DOD's enumeration was designed to ascertain a person's last residence in the United States of six months or more in duration. J.S. 27. As a result, persons were likely to have been counted in the state of the military base to which they were assigned, rather than a state for which, the Secretary argued, they had a "permanent affinity." Id. The Secretary's argument ignores the fact that usual residence at the time of the census, and not state of "permanent affinity," is how all of the civilian and military inhabitants of the United States have been apportioned since 1790. Joint App. 174-75 (Stips. 8, 9), 200, 222.

At this point, the Secretary's remaining choices among DOD file data were: (1) the employee's last duty station in the United States, (2) the state the employee designated as his or her legal residence, or (3) home of record. Joint App. 143.[14/] The Secretary ultimately selected federal employees' "homes of record" as the basis for apportionment. Joint App. 185 (Stip. 50).

Home of record data may seem at first view to be a reasonable choice, since it ostensibly reflects an employee's designation of the place that he or she considered his or her permanent home upon entering military service. However, the reality, as shown by the Administrative Record, is quite different, and explains why the Census Bureau characterized the proposed use of such data as "arbitrary."

First, the DOD testified to Congress as recently as September 9, 1989 that its "home of record" data "has a high error rate." A.R. 740.[15/] The DOD also testified that its home of record for employees might be a place where the employee had not lived for many years and, in some cases, where the person had never lived. Id. This was partially due to the fact that soldiers establish their home of record at the time of enlistment, and cannot change it until they break their military service. Joint App. 147 n.5.

A 1976 study by the federal Advisory Commission on Intergovernmental Relations also revealed that some military personnel selected as their home of record a state with low or no income taxes rather than their "true" home state. Joint App. 55, 61, 180 (Stip. 29). A.R. 83, 100. J.S. App. 77a. It is significant, in this context, that the state of Washington has no income tax, while Massachusetts is one of the 45 states that do. See The Book of the States (1990-91 ed.) 313. This fact alone may explain why the DOD's data on home of record of its employees had a very different distribution between Washington and Massachusetts than their domestic populations. As noted, the imbalanced distribution of "homes of record" caused Massachusetts to lose its eleventh seat in Congress.

14/ Since amicus Washington state has argued that the lower court's decision somehow impairs the absentee voting rights of overseas employees, it is worth noting that the Secretary apparently never considered apportioning overseas employees to the state in which they had registered to vote. See 42 U.S.C. § 1973ff (specifying criteria for absentee voting which are inconsistent with "home of record"). As a result, at least some overseas employees were undoubtedly assigned in 1990 to states other than those to which they had declared their electoral allegiance.

15/ The DOD's August 1, 1989 congressional testimony to the same effect is reproduced in the Joint Appendix at page 124. See also Joint App. 183 (Stip. 43).

J.S. App. 183 (Stip. 42).[16/]

The Defense Department also testified to Congress that home of record data in its personnel records was missing for approximately 10% of its active force. Joint App. 131. A.R. 581. No home of record data at all was available for the DOD's civilian employees. Id. J.S. App. 67a. Many of these facts had been cited by the Secretary during the 1980s as reasons for opposing apportionment based on home of record. See generally Joint App. 55, 62, 79-80, 136. A.R. 37, 41, 43, 83, 832, 857.

These facts clearly support the lower court's conclusion that there was no rational connection between the facts the Secretary found and the choice he made in 1990 to apportion overseas federal employees to states based on home of record file data. J.S. App. 77a-78a, quoting Motor Vehicle Manufacturers Association, Inc., 463 U.S. 29, 43 (1983). An agency's decision may be found arbitrary and capricious if it rests on invalid data. Id. at 75a, citing City of Stoughton v. United States Environmental Protection Agency, 858 F.2d 747, 750 (D.C. Cir. 1988).

Moreover, there is no evidence at all in the record to suggest that the Secretary took any steps to cure the deficiencies in home of record data about which the DOD testified in September of 1989. J.S. App. 77a. Rather than addressing the deficiencies in the data itself, the Census Bureau in 1990 merely established a procedure to attempt to fill the gaps left by the 10% of the DOD's active overseas force and the thousands of the DOD's overseas civilian employees for whom no home of record existed. J.S. 10, 27.[17/] As the lower court noted, however, the fact that the Secretary used other, even less appropriate, data for the many

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16/ For the first time on a post-judgment motion for reconsideration, the Secretary attempted to renounce the Department of Commerce's earlier concurrence with the results of the 1976 Commission study. The Secretary now claims to have discovered that the DOD does not actually use its home of record data to calculate its employees' taxes. Regardless of whether this is true, if both the Census Bureau and a federal commission believed that home of record information was used to determine an employee's state tax liability, then certainly the enlistees who provided such information could be similarly misled. Thus, the study's conclusion that many persons in fact choose their home of record based on tax considerations is not undermined, whether or not the strategy actually was successful in lowering enlistees' taxes.

17/ For those active force employees for whom home of record data was not available, the Secretary first attempted to include them in the apportionment counts based on their legal residence (i.e., tax residence). J.S. App. 67a. Joint App. 186 (Stip. 56). This data element again suffered from the problem of persons choosing a low or no-tax state to claim as a legal residence. Joint App. 151. For the members of the DOD's active force for whom neither home of record nor legal residence data was available, last duty station was used. J.S. App. 67a. Joint App. 186 (Stip. 56). Even after the above procedures were undertaken, there still remained 1,846 members of the active force for whom no home state could be determined at all. Id.

The DOD did conduct a survey of its civilian employees. However, only 20% of the 61,205 persons who were sent questionaires ever returned them; 80% did not. Joint App. 185-87 (Stips. 54, 57). J.S. App. 67a. In the domestic census, persons who do not respond to the ennumeration survey are personally visited by census takers. Tucker, supra, Lexis p. 3. But there is no evidence that such follow-up procedures were even attempted for the DOD's overseas civilian personnel.

DOD employees who had no home of record at all, did not "alchemize" the home of record data that did exist into reliability. J.S. App. 89a. The lower court's conclusion is reinforced by the fact that DOD itself concluded in its September 1989 testimony that none of the three data elements that were utilized by the Secretary for apportionment in 1990 (see supra at 24) "meets a reasonable test of validity for apportionment purposes." A.R. 739. Accord Joint App. 124, 183 (Stip. 44).[18/]

Notwithstanding the belated justifications which the Secretary may offer for her predecessor's decision, the administrative record contains nothing more than post-hoc, conclusory justifications for a decision already made. No such justifications can explain away the lower court's conclusion that the use of home of record data -- proven unreliable by the 1970 census, continually desribed as arbitrary and inadequate during the intervening 20 years by both the DOD and the Census Bureau, and not improved qualitatively in any way -- was arbitrary and capricious.

18/ It should be noted that similar gap-filling procedures were utilized in the 1970 overseas apportionment (Joint App. 179-80 - Stip. 28), but the use of such procedures did not alter the Secretary's conclusion that the results of the 1970 apportionment were too arbitrary to repeat in 1980. J.S. App. 64a, 78a.

B. The Secretary's Failure To Consider Returning To Historic Practice Was Arbitrary And Capricious.

After the factual basis for the Secretary's 1989 decision to apportion -- the planned DOD enumeration -- disappeared, the Secretary had, at the least, an obligation to consider the relevant alternatives and give a reasoned explanation for whatever new decision he reached. Motor Vehicle Manufacturers Association, Inc., 463 U.S. at 43. One obvious option was to return to the historic practice of not apportioning persons living overseas. However, there is no indication in the administrative record that the Secretary even considered this alternative. J.S. App. 79a. Rather, having made an irreversible "commitment" to certain members of Congress, see supra at 12, the Secretary felt constrained to apportion overseas federal employees, despite the disappearance of the key factual premise on which his 1989 decision had been based.[19/]

19/ The "growing bipartisan concern" cited by the Secretary in his 1989 decision memorandum and referred to by the lower court as the political factor behind the Secretary's initial decision to apportion, J.S. App. 66a, as reflected in the administrative record, amounted to little more than letters from individual members of Congress and floor statements made by many of the same persons. Congress has never enacted any legislation on this topic. Joint App. 180-81 (Stips. 33, 37). In I.N.S. v. Chada, 462 U.S. 919 (1983), this Court made clear that in order for Congress to speak authoritatively, it must do so through legislation passed by both Houses and approved by the President. Id. at 954-958. The lower court repeated this

(footnote continued)

Thus, rather than considering a return to historic practice, the Census Bureau ultimately relied on precisely the same data it had consistently found to be too unreliable to use for apportionment. The process by which the Secretary arrived at his ultimate decision cannot be described as a reasoned analysis, and was therefore arbitrary and capricious.

II. THE DECISION TO APPORTION OVERSEAS FEDERAL EMPLOYEES BASED ON HOME OF RECORD DATA VIOLATES THE CONSTITUTION.

The lower court decided this case on statutory grounds, and therefore did not reach the issue of whether the Secretary's decision to apportion overseas employees based on home of record file data violated the Constitution.[20/] See Edward J. De Bartolo Corp. v. Florida Gulf Coast Building and Trades Council, 485 U.S. 568, 575 (1988). In 1988, however, after a careful review of the legislative history of the Fourteenth Amendment, the Justice Department concluded that:

(footnote continued)

Court's admonition against being too "quick to infer a congressional mandate" from "inchoate legislative action," J.S. App. 74a (quoting Motor Vehicle Manufacturers Association, Inc., 463 U.S. at 45), and correctly ruled that these individual expressions of political concern were insufficient to support the Secretary's decision.

20/ The lower court expressed "skepticism" at the constitutional claim, J.S. App. 79a, but did not enter any final order on the issue, as it did concerning the constitutionality of the apportionment formula. J.S. App. 94a-96a.

> [T]hroughout the debates on section 2 of the Fourteenth Amendment, there seems to be a premise that the census would count inhabitants of the United States and not individuals who did not reside in one of the states. Accordingly, we entertain serious doubts as to the constitutionality of any legislation that would seek to include [overseas federal employees] for apportionment purposes.

Jt. App. 241. (emphasis added). The Secretary's decision to apportion overseas employees based on arbitrary home of record data did violate the Fourteenth Amendment, for the following reasons.

The Constitutional Language. The Apportionment Clause originally provided that the states' representation in the House should be based on an "actual Enumeration of ... their respective Numbers." U.S. Const., art. I, § 2. The express language of the original Apportionment Clause thus required that the apportionment of Congress be based on an actual enumeration of the population, that is, the type of "headcount" which the census has conducted of the domestic population, both civilian and military, for the past two hundred years. Tucker, supra at Lexis p. 3.

The Apportionment Clause does not require that apportionment counts be restricted to those persons who are physically present in a state on census day. Since 1790, for example, census authorities have consistently included travelers "occasionally absent" from their home in

apportionment counts. But it does require that persons counted for apportionment be current "inhabitants" of the states to which they are attributed. See Wesberry v. Sanders, 376 U.S. at 13-14.

The Fourteenth Amendment modified this language, adding the restriction that representation in Congress was to be based on "the whole number of Persons in each State." U.S. Const., amend. XIV, § 2. (emphasis added). The plain language of the Fourteenth Amendment thus restricts the Secretary's discretion to change the criteria for apportionment, and requires her to use a standard that apportions persons according to whether or not they are currently residing in a state as of the census date.[21/] See Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (relying in part on the "express language" of the Fourteenth Amendment); Perpich v. Department of Defense, 496 U.S. 334, 110 S.Ct. 2418, 2422 (1990) (plain language of constitution is decisive.)

Legislative History and Contemporaneous Interpretation. The legislative history of these provisions furnishes an additional guide to interpreting their express language. See Richardson v. Ramirez, 418 U.S. at 54. In particular, the

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21/ The constitutional restrictions do not apply, however, to the many discretionary surveys and censuses which the Department of Commerce conducts, see 13 U.S.C. §§ 141 et seq., or to formulas for the distribution of federal funds. See Borough of Bethel Park v. Stans, 449 F.2d at 581 (federal funding counts and apportionment counts need not be identical).

debates leading to the adoption of the Fourteenth Amendment confirm that that apportionment counts must be based solely on the number of current inhabitants of each state.

As described supra at 2-4, the Framers' primary concern in mandating a national census was to insure that the population data upon which apportionment was based would be collected in a uniform and nonpolitical manner. Their intent, in other words, was that "Reapportionment [would] be taken out of politics." Cf. Montana, Slip Op. 24 n.45. As the Census Bureau has stated, the First Congress adopted the concept of "usual residence" in 1790 "to comply with the constitutional requirements." Joint App. 180 (Stip. 32). See United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983) (interpretations of the Constitution by the First Congress are considered particularly persuasive because it included many of the Framers). The usual residence rule has been the "guiding principle" of the decennial census for 200 years, in particular on the issue of counting overseas federal employees. Joint App. 173, 175, 177 (Stips. 4, 10, 18).

Because the usual residence of overseas employees is concededly their station abroad and not any state, Joint App. 174 (Stip. 8), they were not apportioned to states even in the early censuses in which they were counted in the overall population. If the usual residence rule were accepted as the Framers' contemporaneous interpretation of the Apportionment

Clause, therefore, the apportionment of persons abroad to states in 1990 would be plainly unconstitutional. This Court need not, however, go so far in order to decide this case.

The Fourteenth Amendment added new restrictions on congressional apportionment to the Constitution. As noted above, in the aftermath of the Civil War the states again confronted the issue of how to allocate representation in the House. The drafters of the Fourteenth Amendment first proposed to base apportionment on the number of "legal voters" or "citizens" in each state. J.S. App. 62a n.25. The New England states, however, had large numbers of aliens currently residing within their borders who had no permanent ties or official status, as well as large numbers of women and children, left behind by the pioneers, who could not vote. Proposals to base apportionment on concepts of citizenship or suffrage were therefore defeated, in favor of a criterion based solely on the number of persons who were currently residing within each state. Id.

On the specific question of how the Fourteenth Amendment should be applied to federal employees temporarily stationed outside the boundaries of any state, the conduct of the 1870 Census is highly significant. After the Civil War the South was occupied by tens of thousands of federal soldiers and civilian officials, almost all of whom came from northern states. R. Jones, Disrupted Decades: The Civil War and

Reconstruction Years, 418 (1973). Census authorities interpreted the Amendment, ratified only two years before, consistently with the usual residence rule, and apportioned northern troops where they were stationed at the time of the census, not to their states of origin. J.S. App. 62a. Census authorities did so even though the likely result would be to increase the representation of the readmitted southern states in Congress throughout the 1870s. The fact that federal census authorities applied the newly-ratified Amendment in a way that contradicted their natural inclinations is strong evidence of their contemporaneous understanding of the words "in each State."

Finally, for a full century after the ratification of the Fourteenth Amendment, from 1870 to 1970, census authorities did not apportion federal overseas employees back to states. This was the consistent practice even from 1900 on, when such employees were included in the total population of the United States. Joint. App. 177 (Stip. 18). In short, the plain language, legislative history, and subsequent administration of the census all establish that the Fourteenth Amendment was intended to limit state apportionment counts to current inhabitants.

The 1990 Apportionment. This Court need not, however, decide the precise meaning of the restrictions imposed by the Fourteenth Amendment, or conclude that it embodies the usual

residence rule, in order to decide this case. It is enough for present purposes to conclude that the particular method of apportionment that was selected in 1990 -- assignment of overseas employees to states based on unilaterally designated home of record file data -- fails to satisfy the constitutional requirement.

The 1990 Census did not assign overseas employees to states based on where they were actually residing as of the census date. Joint App. 174 (Stip. 8). Nor did it conduct any actual enumeration to determine the state in which employees currently resided or even the state they intend to make a permanent home in the future. Instead, the census chose to treat employees as though they currently resided in whatever state they had chosen to designate, for whatever reason, at the time of enlistment.

As noted above, these listings were often places which the employees had designated as home states simply to reduce their current taxes -- places where they had never actually lived and had no intention of ever living. Even if an employee's "home of record" had once been their home, it might well no longer have been accurate, since the DOD prohibits employees from changing their listed home of record until they leave the military or break their tour of service. Joint App. 147 n.5. Indeed, the agencies themselves had concluded that the DOD's home of record data was "arbitrary" (Census Bureau) and did not "meet a reasonable test of validity for apportionment purposes." (Defense Department) J.S. App. 77a.

In Carrington v. Rash, 380 U.S. 89 (1965), this Court held that the State of Texas could not mechanically and automatically treat military personnel as though they continued throughout their tour of duty to remain residents of the state they inhabited on the date of enlistment. Instead, this Court concluded, the Fourteenth Amendment requires a state to consider the current intentions of such personnel in determining where they actually reside. Id. at 95-96. If a state may not arbitrarily equate current residence with military personnel's actual home on the date of enlistment, then surely the federal government may not arbitrarily equate current residence with whatever "home of record" an individual might have designated, for whatever motive, at the time he or she first entered federal service.

In Carrington, it is true, the effect of the state's attribution was to disenfranchise persons who had later become residents of the state. Here, no such impact is demonstrable. But it is no better, from a constitutional perspective, to dilute the representation of an entire state and its people in the U.S. House of Representatives on the basis of an arbitrary home of record rule, than to improperly withhold the franchise from individuals on such a basis. Carrington may not directly control this case, but this Court would disregard its rationale if it were to uphold the constitutionality of the Secretary's arbitrary rule here.

Congress and its delegee, the Secretary, have some discretion to construe and apply the terms of the Fourteenth Amendment. But they may not act inconsistently with its express language, and, to the extent that any term is unclear, their construction must be consistent with the purpose of the Amendment, which was to restrict the criteria upon which apportionment could be based. The Secretary's use of home of record data in 1990 did not comply with the express words, contemporary interpretation, or consistent administration of the Fourteenth Amendment. It is therefore unconstitutional.

III. THE SECRETARY'S DECISION TO APPORTION OVERSEAS FEDERAL EMPLOYEES TO STATES IS SUBJECT TO JUDICIAL REVIEW.

A. The Decision Does Not Present A Non-Justiciable Political Question.

In her arguments to the court below, the Secretary raised the political question doctrine only as to the "apportionment formula" count of this case. See J.S. App. 24a n.12. Following the entry of judgment, however, the Secretary argued for the first time, in support of her motion for reconsideration, that the overseas employees claim also presented a non-justiciable political question. The three-judge court properly ruled that the Secretary had knowingly waived her political question defense as to the claims presented in this appeal. See J.S. App. 86a-87a. This Court should therefore not consider this argument.

Moreover, this Court has recently rejected the political question argument as it pertained to review of an apportionment formula claim. Montana, supra, at 14-17. The lower court noted in denying the Secretary's motion for reconsideration that her argument concerning the overseas employees claim was very similar to the argument she had advanced in the apportionment formula context. J.S. App. 86a. Accord Tucker, supra, Lexis pp. 12-14. It follows that, if considered at all, the Secretary's political question argument should be rejected for the reasons set forth in Montana.

B. The Secretary's Decision Is Reviewable Under The Administrative Procedure Act.

There is a "strong presumption" that Congress intends judicial review of administrative action. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962). See generally, Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670-73.

The Secretary argued below, however, that the decision to apportion overseas federal employees to states falls within the "narrow exception" for matters "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Citizens to Preserve Overton

Park v. Volpe, 401 U.S. at 410. The Secretary also argued, for the first time in her motion for reconsideration, that the Census Act itself precludes judicial review under the APA. 5 U.S.C. § 701(a)(1). The lower court rejected both these arguments.[22/] J.S. App. 86a n.1.

1. **The Secretary's decision is not committed to agency discretion by law.**

In determining whether an administrative decision is committed to agency discretion by law, a court must ask whether there is a "meaningful standard against which to judge the agency's exercise of discretion." Webster v. Doe, 486 U.S. 592, 600 (1988), quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985). With regard to the Secretary's decision to apportion overseas federal employees to states, a number of sources provide such a standard. Article 1, § 2, cl. 3 of the Constitution, as modified by the Fourteenth Amendment, requires an "actual Enumeration" of population every ten years in order to determine "the whole number of persons in each State" for purposes of apportioning Congressional seats (emphasis added).

22/ The lower court also cited ten federal court opinions holding that the decisions made by the Secretary of Commerce and the Census Bureau as to the conduct of the decennial census are subject to review under the arbitrary and capricious standard of the APA. J.S. App. 68a-69a. The only case suggesting otherwise, Tucker v. United States Department of Commerce, supra (see discussion at 44-45 n.26, infra), was decided after the three-judge court rendered its decision.

In conformance with the constitutional mandate, 13 U.S.C. § 141(a) requires that the Secretary "take a decennial census of population . . . in such form and content as he may determine . . . ," and Section 141(b) requires that the Secretary report the census results to the President. This permits the President to meet his statutory duty under 2 U.S.C. § 2a, to transmit "to the Congress a statement showing the whole number of persons in each state." (emphasis added) "Thus the discretion exercised by the Secretary, at least with respect to the apportionment counts, is cabined by a duty to take a census which produces a tabulation providing the whole number of persons in each state." J.S. App. 70a. The Secretary cannot persuasively argue that judicial review is unavailable to determine whether these requirements have been adhered to.

In reviewing this constitutional and statutory framework for purposes of determining whether there is a "judicially meaningful standard" to apply, the Court should be guided by familiar principles of statutory construction. Thus, the Court should accord weight to the statutory interpretation of the administrative agency charged with its enforcement. See Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116, 120 (1985). Since the first census in 1790, census authorities have interpreted the Census Act to embody the usual residence rule, namely, that persons

are to be counted where they are usually living and sleeping most of the time as of the census date. See supra at 5. As the contemporaneous, longstanding, and consistently applied administrative interpretation of the Census Act, the usual residence rule should be accorded particular weight. See Equal Employment Opportunity Commission v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Andrus v. Shell Oil Co., 446 U.S. 657, 667-68 (1980), and cases cited.[23/]

In addition to its usefulness as an aid to construing the Census Act, the usual residence rule independently contributes to the existence of a "meaningful standard for judicial review." See J.S. App. 70a. While in Heckler v. Chaney, 470 U.S. at 836, the Court left the issue open, the lower courts have properly concluded that "[j]udicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes." Padula v. Webster, 822

23/ It is of no significance that the explicit language of the First Census Act, which formed the basis for the usual residence rule, was deleted from the statute in 1850. The Act was extensively rewritten at that time in response to widespread dissatisfaction with the errors that had occurred in the 1840 census, as well as the desire to chronicle and support the growing industrialization of the nation. M. Anderson, supra, 33-36, 38-40. C. Wright and W. Hunt, supra, 38-41. Despite the changes, however, Congress' and census authorities' interpretation of the Act as embodying the usual residence rule did not change. In particular, as part of the 1850 reforms, census authorities supplied enumerators for the first time with a set of formal rules for counting the population. The usual residence rule was the first rule of enumeration. Joint App. 93.

F.2d 97, 100 (D.C. Cir. 1987). See also Vigil v. Rhodes, 953 F.2d 1225, 1230 (10th Cir. 1992); CC Distributors, Inc. v. U.S., 883 F.2d 146, 156 (D.C. Cir. 1989); Massachusetts Public Interest Research Group v. Nuclear Regulatory Commission, 852 F.2d 9, 16 (1st Cir. 1988). Cf. Service v. Dulles, 354 U.S. 363, 388 (1957). Indeed, a contrary doctrine, confining "judicially meaningful standards" to statutes and nothing more, would fail to account for the distinction between the "committed to agency discretion by law" provision of § 701(a)(2) and the "statutes preclude judicial review" provision of § 701(a)(1). See Webster v. Doe, 486 U.S. at 608 (Scalia, J., dissenting) (emphasis in original). See also Id. at 605 (O'Connor, J., concurring in part and dissenting in part). While application of the usual residence rule presents questions of interpretation in particular circumstances, see J.S. App. 60a-61a n.24, it is precisely the type of standard that courts apply routinely to specific sets of facts in deciding cases.

What the lower court described as "pragmatic concerns" also weigh in favor of reviewability and contribute to a meaningful standard for judicial review. J.S. App. 70a-71a, citing Levin, Understanding Reviewability in Administrative Law, 74 Minn. L. Rev. 689 (1990). In 1787, the Framers expressed grave concerns that if no constraints were placed on Congress' ability to reapportion itself, serious abuses would result. See supra, at

2-3. As the lower court noted, "[i]t is especially appropriate to have some review by the courts, as the disinterested branch of government, in order to insure a neutral process and safeguard the interests of the potentially disadvantaged in the conduct of the census." J.S. App. 71a.

In recent cases where this Court has found administrative decisions to be nonreviewable, fundamentally different pragmatic concerns have counseled against judicial review. Indeed, the Court's application of the "committed to agency discretion" exception has been narrowly confined to cases involving prosecutorial discretion, Heckler v. Chaney, 470 U.S. at 823,[24/] and situations which implicate national security concerns, Webster v. Doe, 486 U.S. at 592.[25/] See Diebold v. U.S., 947 F.2d 787, 790 (6th Cir. 1991) (citations omitted). By contrast, the pragmatic concerns in this case weigh heavily in favor of reviewability.[26/]

24/ Accord Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987); Southern Railway v. Seabord Allied Milling Corp., 442 U.S. 444 (1979); Morris v. Gressette, 432 U.S. 491 (1977).

25/ Accord Department of the Navy v. Egan, 484 U.S. 518 (1988).

26/ The one lower court opinion finding a decision of the Secretary concerning the census to be unreviewable, Tucker, supra, involved the question of whether the census should be statistically adjusted to compensate for undercounting. In contrast to the decision to apportion overseas federal employees, where the Constitution, statutes, and the usual

(footnote continued)

2. The Census Act itself does not preclude judicial review of the Secretary's decision.

There is no explicit language in the Census Act that precludes review of the Secretary's decision to apportion overseas federal employees to states. In light of the volume of litigation over census decisions in recent decades, see, e.g., 40 n.22, supra, Congress could have amended the statute to add an explicit prohibition on judicial review of census decisions if it wished to curtail such review. Thus, for example, the section of the Census Act which allows states to request data for redistricting from the Secretary, explicitly provides that the Secretary "shall have final authority for determining the geographic format of such plans." 13 U.S.C.

(footnote continued)

residence rule provide a meaningful standard against which to evaluate the decision, there exists no authoritative text, nor any longstanding and consistently applied practice, to rely upon in addressing the statistical problem of undercounting. Indeed, awareness of the problem of undercounting did not even develop until relatively recently with the advent of modern computer technology.

Moreover, the highly technical nature of the undercounting problem makes a judicial resolution much more difficult to achieve than with the clear issue of whether to apportion overseas employees. In the circumstances of Tucker, the decision whether to adjust statistically for census undercounting presented a problem of technical methodology that may have lacked a judicially meaningful standard for review, but the catagorical decision to apportion overseas federal employees to states does not.

§ 141(c) (emphasis added).[27/] See McNary v. Haitian Refugee Center, Inc., 111 S.Ct. 888, 897 (1991). Alternatively, Congress could have included the Secretary's functions under the Census Act among the list of functions and statutory provisions which are explicitly excluded from coverage of the APA. See 5 U.S.C. § 551(H).

Nor is this one of the very rare cases in which the factors cited in Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984), indicates "clearly and convincingly" a Congressional intent to preclude review of the Secretary's decision to apportion overseas federal employees to states. Compare Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 470-73.

The Secretary seeks such an implicit intent to preclude review, first, in 2 U.S.C. § 2a's requirement that the President "transmit" to Congress a statement showing the whole number of persons in each state (as calculated by the Secretary), and the number of Representatives to which each state would be entitled under the mathematical formula contained in the statute. J.S. 22. It is unclear, however, why this ministerial function on the part of the President should be viewed as indicating a clear legislative intent to shield the Secretary's decision to apportion from judicial review.

27/ This Court has found, however, that even such apparently explicit provisions do not preclude all judicial review. See Shaughnessy v. Pediero, 349 U.S. 48 (1955); Harmon v. Brucker, 355 U.S. 579 (1958).

To the contrary, the legislative history of the Census Act clearly demonstrates that the President's role in the statutory scheme was intended to have no substantive content. As stated in the report of the Senate Committee on Commerce which accompanied the bill that added 2 U.S.C. § 2a to the statutes at large, the President's only role under the provision is to report "upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. No. 2, 71st Cong., 1st Sess. 4-5 (1929).[28/]

In light of the purely ministerial nature of the President's role, and the fact that plaintiffs challenge no decision of the President, the fact that the President appears in the statutory scheme does not suggest a congressional intent to preclude judicial review of the Secretary's decision. Contrast Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) (Presidential approval required for Civil Aeronautics Board to grant authority to

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28/ Congress' intent as to the President's role was further clarified during debate over the bill, when its author, Senator Vandenberg of Michigan, stated:

> In my judgment and I believe as a matter of indisputable fact, that any function served by the President is as purely and completely a ministerial function as any on earth could be. 71 Cong. Rec. 1858 (1929). See also Id. at 1613 (remarks of Sen. Vandenberg).

engage in overseas air transportation).[29/]

The time frame for the conduct of the decennial census and subsequent reapportionment also fails to show a congressional intent to preclude judicial review. J.S. 23. The two and one-half years between the census date and the first congressional election of the succeeding decade provide ample time to conduct the minimal judicial review contemplated by the APA.[30/] Since APA claims are confined to the administrative record, Camp v. Pitts, 411 U.S. 138 (1973), judicial review can be had on an expedited basis. Indeed, in this case, less than six months will have elapsed between the filing of dispositive motions in the lower court (November 5, 1991) and argument in this Court (scheduled for April 21, 1992). Joint App. 10-11. Of course, if Congress wished to speed the process of judicial review, it could impose a deadline within which challenges to census decisions would have to be filed, for example, 30 or 60 days after release of the state population counts, as is

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29/ Nor can a congressional intent to preclude judicial review be inferred from the fact, emphasized by the Secretary, that she is not required to publish the tabulations of population by state. J.S. 23. While an absolute preclusion of disclosure of the state population figures might tend to indicate such an intent, any member of the public may obtain the figures at issue in this case through the Freedom of Information Act, 5 U.S.C. § 552. Moreover, the Secretary was required to transmit the 1990 state population counts to other officials in government. See, e.g., 42 U.S.C. § 10403(b).

30/ Using the 1990 census as an example, this period runs from the census date, April 1, 1990, to the Congressional election, November 3, 1992.

done in other statutes (see, for example, 28 U.S.C. § 2344), and could require expedited hearings in the lower courts.

The cases relied upon by the Secretary in support of her argument that the statutory time frame precludes review are also inapposite. J.S. 24. Rather than focusing on timing issues, Morris v. Gressette, 432 U.S. at 491, and Southern Railway v. Seabord Allied Milling Corp., 442 U.S. at 444, involved administrative decisions not to enforce, where, as pointed out above, this Court has found agency discretion to be the greatest. See supra at 44. Moreover, in both Morris and Southern Railway, even if judicial review were not available under the particular provision at issue, court review of the same question was nevertheless available through other means. See Morris, 432 U.S. at 505;[31/] Southern Railway, 442 U.S. at 444. Accord American Bank, N.A. v. Clarke, 933 F.2d 899 (10th Cir. 1991).

By contrast, if the plaintiffs here cannot obtain judicial review of the Secretary's decision for arbitrariness under the APA, it is unlikely that such review will be available at all. This Court has rejected arguments that would preclude all

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31/ The Court in Morris also focused on the "unusual" and "severe" nature of the remedy in the event that the Attorney General did object, which was to suspend implementation of validly enacted state legislation, and what the majority viewed to be clear legislative history that the Attorney General's failure to object was not subject to review. Id. at 504.

judicial review of questions as significant as the regularity of the conduct of the decennial census. See McNary v. Haitian Refugee Center, Inc., 111 S.Ct. at 898; Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670. See also Save the Bay, Inc. v. Administrator of E.P.A., 556 F.2d 1282, 1296-97 n.15 (5th Cir. 1977).[32/]

Finally, the fact that census counts are reported to Congress does not indicate an intent that the Secretary's decision be unreviewable. J.S. 24. While it is true that Congess can enact legislation that would moot any judicial review of the Secretary's decision, this is true of virtually every administrative decision. Moreover, the history of the modern Census Act demonstrates vividly that Congress itself has recognized its own inability to deal effectively with census and apportionment matters. The adoption of the automatic apportionment procedure in 1929 was a direct result of Congress' inability to pass any apportionment law following the 1920 census. Montana, supra, at 8. J.S. App. 35a. M. Balinski and H.P. Young, Fair Representation: Meeting the Ideal of One Man One Vote 56 (1982). As the law's author, Senator Vandenberg, stated in debates leading to the enactment of the statute:

32/ Even in Block v. Community Nutrition Institute, although the Court ruled that judicial review of the Secretary's decisions under the statute at issue was not available to consumers, it noted that handlers (whose interests were considered to parallel those of consumers) could still obtain such review. 467 U.S. at 352.

> I submit that the experience of the past eight years proves that this problem can not be left wholly to Congress . . . [W]e have reached the point where it no longer is safe or possible, as demonstrated by the last eight years of constitutional trespass, to leave the problem wholly to the voluntary instincts and attitudes of Congress itself.

71 Cong. Rec. 1611-12 (1929). These comments are strikingly similar to those of the Framers, who concluded in 1787 that reapportionment was too significant to leave to the sole discretion of Congress, see supra at 2-3, and confirm the need for judicial review of the conduct of the apportionment census.[33/]

IV. THE ORDERS ENTERED BY THE DISTRICT COURT WERE PROPER.

A. Remand Was Neither Required Nor Appropriate in the Circumstances of this Case.

In most instances in which a court finds that an official has acted arbitrarily or abused his discretion, a remand to the agency for further consideration is the proper remedy. In

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33/ Indeed, the experience of the one instance of Congressional action since the enactment of the statute bore out Senator Vandenberg's fears. When under the 1940 census the method of equal proportions would have yielded an additional seat to Democratic Arkansas, but the method of major fractions would have given that seat to Republican Michigan, the Congress voted along purely partisan lines to give the seat to Arkansas. Montana, at 23 n.42. It is precisely such partisan politics that the Framers sought to avoid in 1787 when they determined that a neutral, apolitical census should form the basis for reapportionment. See supra at 3-4.

certain circumstances, however, remand may not be appropriate. In Florida Power and Light Co. v. Lorian, 470 U.S. 729, 744 (1985), for example, this Court noted the presumption in favor of remand, but recognized that exceptions could be made in rare circumstances. Cf. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766-67 n.6 (1969). This is one of those cases in which a remand would serve no useful purpose, and would in fact cause irremediable harm.

In making its decision as to remedy, the three-judge panel stated that it was "intensely aware that the practical process of reapportionment following the 1990 census has been going on for over a year." J.S. App. 82a. In these circumstances, the court concluded, further delay was intolerable and would cause serious harm to the prevailing parties, the Commonwealth of Massachusetts and its voters. J.S. App. 91a. In particular, the uncertainty over whether Massachusetts would retain its existing number of seats in Congress, and therefore over the boundaries of congressional districts, was causing serious disruption in the efforts of candidates (particularly challengers to incumbents) to mount campaigns and comply with state nominating requirements. See Affidavit of William P. Lee, ¶¶ 3, 4.[34/]

34/ The Lee Affidavit was first submitted with Massachusetts' Opposition to Application for Stay and is on file with this Court. The lower court was aware of the essential facts set forth therein because of the pendency of redistricting litigation. See J.S. App. 83a n.32.

Even more importantly, there could not now be a genuine reconsideration. The decennial census is not a continuing process, but rather is intended as a "snapshot" of the American population as of the April 1 census date. 13 U.S.C. § 141(a). The 1990 census occurred two years ago. Many defense department employees who could have been surveyed in 1990, or whose personnel records might have been corrected at that time, have left the military. As the Secretary recognized, after the DOD cancelled its planned enumeration, the only possible method of apportioning overseas employees was to rely on data in DOD's files. As the Census Bureau's analysis showed, there were only three types of file data available: last U.S. six months residence, legal residence, and home of record, Joint App. 143, and all three were unreasonable (DOD) or arbitrary (Census Bureau) bases for apportionment. J.S. App. 77a. There is no longer any way to reconstruct the past so as to create a better method.

The passage of time has thus eliminated all options other than returning to historic practice. Since all of the parties had stipulated as to how the census totals should be adjusted if Massachusetts prevailed, the court reasonably concluded that equitable considerations required immediate action. J.S. App. 82a.

In deciding not to remand, the court also cited the strong evidence that the Secretary would not reconsider his decision

even if given the opportunity to do so. See supra at 11-13. As the court found, after the factual premise for his policy reversal disappeared, "there is no evidence that the Census Bureau considered reverting to its prior policy . . . Instead, responding to what appear to have been inertial forces which did not permit even thinking about turning back once the policy reversal had been announced," the defendants refused to reconsider their decision to apportion. J.S. App. 76a.

The district court did not rely solely, however, on the absence of any evidence of reconsideration in the administrative record. At oral argument, the court pressed the issue, asking counsel whether, apart from the record, there was any indication that the Secretary had ever considered his other policy options. As the court noted, however, "counsel for the defendants contended that the Secretary, once having made the policy choice on the basis that home of record information would not be used, was somehow committed to using that information when the underlying factual assumption became obsolete . . . ." J.S. App. 78a. Indeed, as set forth supra at 12, the Justice Department stressed to the court that the Secretary's "commitment" was irreversible and precluded him from exercising independent judgment and reconsidering the policy even after the factual assumptions on which it was based disappeared.

In selecting a remedy, the three-judge panel was entitled to rely on the factual representations made to it by counsel. This is particularly true where, as here, the Justice Department's representations were reaffirmed, id., and confirmed what the court had already found in the Administrative Record: complete intransigence and refusal on the part of the agency head to consider an important policy option.

In similar circumstances, other federal courts, applying the Lorion standard, have also found that remand to an agency for reconsideration would be futile. See, e.g., We Who Care, Inc. v. Sullivan, 756 F. Supp. 42, 47 (D.Me. 1991) (holding that an administrator acted arbitrarily, but declining to remand, on the ground that to do so would be "futile and inappropriate"); Glaxo Operations UK Ltd. v. Quigg, 706 F. Supp. 1224, 1226 (E.D.Va. 1989), aff'd 894 F.2d 392 (Fed. Cir. 1990).

Indeed, in the closely-related area of administrative exhaustion, this Court recently held that while federal courts must ordinarily defer to the administrative decisionmaking process, deference is not required in certain circumstances. In McCarthy v. Madigan, ___ U.S. ___, 112 S.Ct. 1081 (1992), the Court permitted a prisoner alleging improper deprivation of medical care to avoid the prison system's adjudicatory procedures and sue directly in federal court. Id. at 1092. In

doing so, the Court noted that separation of powers principles ordinarily require that courts allow an agency to make decisions in the area committed to it by Congress and "to correct its own mistakes," id. at 1086, but that this presumption should not be applied when "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim" or the agency has "predetermined the issue before it." Id. at 1087-88 (citing prior decisions).

This Court has also cautioned that "cases arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to an agency's judgment is inappropriate." Bowen v. City of New York, 476 U.S. 467, 483 (1986), citing Mathews v. Eldridge, 424 U.S. 319, 330 (1976). This is especially true where, as here, it is unlikely that the plaintiff will be able to obtain an openminded review from the agency. See, e.g., Bowen, 476 U.S. at 485 (where agency is likely to adhere to prior policy due to external pressure, there is nothing to be gained by returning the issue to it for consideration); Houghton v. Schafer, 392 U.S. 639, 640 (1968) (referral is not required where an official has prejudged an issue, so that to do so would be "a futile act.")

The three-judge panel in this case found both that the plaintiffs would suffer serious and irreparable harm if judgment were delayed, and that the Administrative Record,

supplemented by the defendants' representations to the court, made it clear that they refused to consider the option of returning to historic census policy. In these exceptional circumstances, the district court correctly concluded that a remand would be a futile gesture, and would cause irreparable harm to Massachusetts citizens.

B. Even If this Case Is Remanded, the Lower Court's Orders Should Remain in Effect.

Even if remand were the proper remedy, it does not follow that the lower court's orders should be vacated. This Court should, as a condition of remand, vacate the Secretary's decision. See, e.g., Federal Power Commn. v. Texaco, Inc., 417 U.S. 380, 401 (1974) (vacating agency decision as a condition of remand); Camp v. Pitts, 411 U.S. at 143 (same).

Any reapportionment of Congress must be based on accurate data which is assembled according to legal process. If this Court vacates the Secretary's decision, it follows that his reported results, based on arbitrary data, may not stand. In fact, as the parties have stipulated, the erroneous data affects the apportionment of only a single seat in Congress, involving Massachusetts and Washington. Joint App. 183 (Stip. 42). With the vacation of the Secretary's decision, the apportionment of that one seat is therefore invalid.

Foreseeing the possibility of periods in which a reapportionment temporarily would not be effective, Congress has provided in the reapportionment statute, 2 U.S.C. § 2a(b), a procedure for such situations. Section 2a(b) states in relevant part that "Each State shall be entitled . . . until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in [its last reapportionment certificate]. . . ." Applying this rule, Washington and Massachusetts should, until the Secretary has reached a new, valid decision concerning the inclusion of overseas employees in apportionment counts and has reported the results, revert to the number of seats that each state was awarded in the 1980 reapportionment: eight and eleven respectively. The court's orders achieve this result. Whether the lower court's reasoning or the mechanism of Section 2a(b) is followed, therefore, the result should be the same: pending a reconsideration and the results of a valid method of apportionment by the Secretary, Massachusetts and Washington's congressional representation should remain at the same level as it has been for the past decade.

C. The Court's Orders Do Not Intrude on the Interests of the States or the Census Generally.

The appellants have contended that the Final Orders of the District Court would disrupt the "settled expectations of the

states," Application for Stay at 2, force the Secretary to "revise the 1990 census tabulations for every state," id., and require 922,810 persons to be "thrown out of the underlying census count." Id. J.S. at 15. As a review of the Final Orders and Decrees will show, this is simply not true.

The Final Decrees and Orders of the three-judge court require the Secretary simply to "submit...a statement showing the number of Representatives to which each state would be entitled...."[35/] J.S. App. 83a. There is no order requiring recomputation of underlying census totals or "throwing" any person out of the count. In fact, the Secretary need not recompute census totals at all, since the parties stipulated in advance that the only impact of a decision in favor of the plaintiffs would be that Massachusetts would retain the 435th seat awarded in the census, which otherwise would go to Washington state. Joint App. 183 (Stip. 42). The parties below agreed that the other 48 states would not be affected by a decision in favor of Massachusetts.

Despite the fact that the lower court's Final Orders plainly require no recomputation of underlying census counts, the appellants may suggest that they do. The apportionment census has no necessary relationship, however, to the many

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35/ The court clearly had the legal authority under Section 706 of the APA to enter such an order against the Secretary, and the appellants do not appear to contend otherwise.

surveys which the Commerce Department conducts under statutory authority. See, e.g., 13 U.S.C. §§ 161, 181. Thus, for example, the Department's mid-decade census is to be conducted "without regard to" the decennial census and "not used for apportionment." 13 U.S.C. § 141(d) Nothing requires that the constitutional and discretionary surveys be conducted in the same manner, and in fact they are not. See, e.g., Borough of Bethel Park v. Stans, 449 F.2d at 581 (inclusion of persons in state apportionment counts does not require that they also be included in municipal figures). There is thus no reason for concern that the decision in this case will affect the 1990 census totals or federal benefit programs generally.

D. The Court's Orders Do Not Intrude on the Authority of the President.

The Secretary also stressed in her Jurisdictional Statement that the lower court's orders allegedly intrude into the authority of the President. J.S. at 28. This, too, is inaccurate. The President's role in the reapportionment process is simply to "transmit" the results computed by the Secretary to the Clerk of the House. The legislative history of 2 U.S.C. § 2a makes clear that Congress had no intention of conferring any discretionary authority on the President to change census results. See supra at 47 n.28. The President's role in transmittal is thus wholly ministerial.

Since at least Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), this Court has distinguished between the discretionary and ministerial roles of executive officials including the President, suggesting that while the courts should not order an executive official to take discretionary action, the same rationale does not apply to purely ministerial actions. Id. at 610 ("The mandamus does not seek to direct the postmaster general in the discharge of any [executive] duty . . . but to enforce the performance of mere ministerial act, which neither he nor the President had any authority to deny or control." (emphasis added) See Mississippi v. Johnson, 71 U.S. 475, 498 (1866). Although this Court has not squarely confronted the question, but cf. United States v. Nixon, 418 U.S. 683, 706 (1974), lower courts have applied the reasoning of Kendall to conclude that the judiciary may compel a President to perform a purely ministerial act. National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C.Cir. 1974).36/

Although this Court might elect to remand this issue to the lower court in the expectation that the Office of the President

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36/ In her Jurisdictional Statement, the Secretary cited a lower court holding that the President is not subject to the APA. J.S. 22. See Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991). This is irrelevant, however, since no action or omission by the President or his staff has ever been called into question or otherwise put at issue in this litigation. The President played no apparent role in the decision to apportion overseas employees to states, and the Secretary did not cite any evidence to the district court that he did.

will promptly transmit revised census results sent to it by the Secretary, id., the courts may, if necessary, issue orders to the President to carry out a ministerial act. See, e.g., Powell v. McCormack, 395 U.S. 486, 550 (1969).[37/]

E. The Court's Orders Do Not Intrude on the Authority of Congress.

The appellants likewise complain that the lower court's order to the House Clerk to issue revised certificates of entitlement to Washington and Massachusetts, in accordance with the revised results reported by the Secretary, intrudes on the authority of Congress. J.S. at 24. However, as the Secretary has recognized, under the provisions of 2 U.S.C. § 2a, "the Clerk performs only the ministerial task of notifying the States of the number of representatives to which they are entitled under the President's statement." Brief of U.S. Dept. of Commerce in Montana, at 33 n.27. If there were any doubt on this point, it is confirmed by the fact that in the absence of the Clerk, this role is performed by the Sergeant-at-Arms or the Doorkeeper. 2 U.S.C. § 2a(b).

That a court may issue orders to compel the performance of ministerial acts by House officials is established by this

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37/ Massachusetts notes that, in compliance with statements by this Court suggesting that a party seeking even a less favorable judgment must cross-appeal, it has filed a Jurisdictional Statement which holds open the issue of remedy.

Court's decision in Powell v. McCormack, 395 U.S. at 486. Again, this Court might conclude that the House Clerk should be given a brief opportunity to comply with the decision in this case before an order issues against him, id. at 550, but there is no doubt of the federal courts' authority to compel action if necessary.

It should also be noted that the House Clerk agreed to be bound by any orders that the district court might enter in this case, and did not participate in the proceedings below. J.S. App. at 3 n.1. Nor did the other defendants below argue the issue of the court's authority over the House Clerk on his behalf. The district court was therefore fully justified in entering the order it did against him.

CONCLUSION

For these reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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